Supreme Court, U.S.
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No. 98-1657

IN THE

# Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS ex rel.
JAMES E. RYAN, Attorney General of Illinois,

*Petitioner,*

*v.*

JAMES TOWERS,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## OPPOSITION TO PETITION FOR CERTIORARI

This is not a case which needs a determination of the distinction between criminal, quasi-criminal and civil restitution, or a determination of whether the decision below creates "uncertainties". This is a case in which the court must determine whether the underlying circuit court judgment is a fine or disgorgement, or a civil judgment requiring repayment to victims. There is no basis anywhere in the common law or in the State's pleadings to justify calling the award anything other than pecuniary restitution to specific consumers who are listed in the Judgment. Nothing is to be paid to the governmental unit, the payments are directed to be paid to the consumers. Neither are there uncertainties created. The State is being told by the Seventh Circuit Court of Appeals that If a debtor files bankruptcy the State must follow the Bankruptcy Code and object to discharge in a timely manner unless the claim is protected by 11 U.S.C. § 523(a)(7).

## COUNTER STATEMENT OF THE CASE

The State of Illinois (the "State") filed its adversary complaint in the underlying action seeking a determination of non-dischargeability of certain claims against James Towers ("Debtor"). The claims are based on an *ex parte* default judgment entered by the Circuit Court of Cook County, case No. 86 CH 5458.

Debtor filed a Chapter 7 Petition in Bankruptcy in Case No. 87 B 04905 and an Order of Discharge was entered pursuant to that Petition on August 6, 1987. Prior to discharge, the State had petitioned the Bankruptcy Court for and obtained relief from the automatic stay allowing it to proceed to Judgment in the underlying Circuit Court case No. 86 CH 5458 but the State did not object to discharge.

It is the Debtor's position that the Order of Discharge entered in Case No. 87 B 04905 discharged the claim sought to be non-dischargeable in Plaintiff's Complaint filed in Case No. 95 B 01042 as Adversary No. 95 A 00329.

The adversary complaint was originally brought under 11 U.S.C. § 523(a)(2) and 11 U.S.C. § 523(a)(4), however, because the complaint under 11 U.S.C. § 523(a)(2) and 11 U.S.C. § 523(a)(4) was not timely, as to the 1987 Bankruptcy, the State, in its motion for Summary Judgment sought a determination of nondischargeability under 11 U.S.C. § 523(a)(7).

In its petition for Writ of Certiorari, the state relies on the dual arguments that: (1) The holding in the decision of the 7th Circuit is in conflict with the decisions of this court in *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216, (*Kelly*) and the decision of the 4th Circuit in *U.S. Department of Housing and Urban Development v. Cost Control Marketing and Sales Management of Virginia, Inc., et al.*, 64 F3d 920 (4th Cir. 1995) (*CCMV*); and (2) The State should not be burdened with the requirement that it defend restitution awards in the Federal Bankruptcy Courts.

The Order Lifting the Automatic Stay which was entered in the 1987 Bankruptcy case allowed the State to proceed with the existing State Court proceeding but the order did not include a finding as to the dischargeability of the claim.

The Circuit Court judgment entered against James Towers was entered pursuant to the allegations contained in a Verified Complaint which consisted of a list of the names of the consumers and a summary of their alleged losses.

## REASONS FOR DENYING THE WRIT

### I.

### THE HOLDING OF THE SEVENTH CIRCUIT IS CONSISTENT WITH THE *CCMV* AND *KELLY* DECISIONS AND THE CIVIL RESTITUTION AWARD TO THE INDIVIDUAL CLAIMANTS IS NOT EXCEPTED FROM DISCHARGE UNDER § 523(a)(7).

The State maintains that this action was brought under § 523(a)(7) for which there is no time limit. However, under the clear input of the case law cited by Plaintiff and in particular in *Kelly* and in *CCMV*, the only basis for non dischargeability is found under 11 U.S.C. § 523(a)(2) or 11 U.S.C. § 523(a)(4) since the courts in both *Kelly* and *CCMV* find that in order be non-dischargeable under § 523(a)(7) a debt must be

> [A] fine, penalty, or forfeiture payable *to* and *for the benefit of* a governmental unit and [that] is *not* compensation *actual pecuniary loss*[.]

(Emphasis supplied). 11 U.S.C. § 523(a)(7), *CCMV* at 927.

> §523(a)(7) protects from discharge any debt "to the extent such debt is a fine, penalty or forfeiture payable *to* and *for* the benefit of a governmental unit and is not compensation for actual pecuniary loss."

(Emphasis supplied). *Kelly* at 50. In order to be excepted from discharge, debts must satisfy two requirements: (1) they must be *to* and *for* the benefit of a governmental unit; and (2) they must be penal rather than pecuniary in nature. *Kelly* at 51.

This Court does not need to distinguish among criminal, quasi-criminal and civil restitution. The Court need only determine whether the Two Hundred Ten Thousand Eighty Two Dollars and Thirty Four Cents ($210,082.34) is a fine or a "disgorgement" as it is called in *CCMV*, or simply a civil judgment award requiring payment to the consumer victims. There is no reasonable basis for characterizing the award as

anything other than a pecuniary award to the consumers listed in the appendix referenced in the Judgment. The award is clearly not to be paid *to* or *for* a governmental unit since the plain language of the judgment directs otherwise.

Curiously absent from the State's petition is a copy of the judgment in question entered in the State Court which provides in part in paragraph F.:

> Percy Middleton and James Towers are hereby ordered to pay the amount of Two Hundred Ten Thousand Eighty Two Dollars and Thirty Four Cents ($210,082.34) as restitution *to the consumers harmed* by defendants' unlawful acts and business practices, as provided by Section 7 of the Consumer Fraud Act. A list of the names and addresses of consumers and the amount of *restitution to each* is attached as appendix A. (App 4a) (emphasis supplied). (The order included in the appendix to this brief does not include the appendix referred to above.)

The appendix A referenced in the order consists of a list of approximately 70 consumers and the amount to be paid to each. The amount in the order is the total of the amounts on the list.

The judgment does not fall within the exceptions to discharge pursuant to 11 U.S.C. § 523(a)(7). Although the State relys on *CCMV*, he *CCMV* facts are clearly distinguishable from the instant case because the restitution in *CCMV* is directed to be paid *to* the governmental unit:

> . . . HUD has measured its disgorgement remedy by the amount lot purchasers lost, and it has often stated in this record that it intends to use some or all of its recovery to reimburse those purchasers. On the other hand, the final judgment orders *payment to HUD and imposes no obligation on HUD to disburse the money to anyone.*

(Emphasis supplied). *CCMV* at 927.

## II.

## THE STATE WAS ABLE TO OBTAIN RELIEF FROM THE AUTOMATIC STAY, BUT FAILED TO OBTAIN RELIEF BASED ON ITS OBJECTIONS TO DISCHARGE UNDER 11 U.S.C. § 523(a)(2) AND 11 U.S.C. § 523(a)(4).

Had the state addressed the dischargeability issue when it sought relief from the automatic stay the amount of the claim as well as the issue of dischargeability would have been resolved in the 1987 bankruptcy case.

Had the state read § 523(a)(7) of the Bankruptcy Code before drafting the judgment order it may have been able to cure the defect. The only "penalty" in the judgment order is the $50,000 fine set out in paragraph G of the judgment. (App. 4a).

The Seventh Circuit's decision does not create uncertainty about dischargeability as the State argues, on the contrary, it provides clarification: If the State fails to comply with the provisions of the Bankruptcy Code it may find that the claim is discharged. and, Obtaining a restitution order that *requires* the State to pay the restitution to the victims will take the order out from under the protective umbrella of § 523(a)(7).

## CONCLUSION

It is submitted that the only basis for recovery for the State as to the Two Hundred Ten Thousand Eighty Two Dollars and Thirty Four Cents ($210,082.34) was under § 523(a)(2) or (a)(4) and the State is time barred from pursuing relief under these sections. It is not an unreasonable requirement that the State be required to be familiar with and comply with the Bankruptcy Code when collecting debts from its citizens including filing timely objections to dischargeability and it is therefor submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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